

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

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Eko Brands, LLC.,

Case No. 2:20-cv-2076-RCJ-BNW

Plaintiff,

### Order re [21]

V.

Houseware Solutions, LLC, et al.,

### Defendants.

12 Before the Court is plaintiff Eko Brands, LLC's motion for an order permitting service by  
13 email or publication. ECF No. 21. Eko has not shown that service by email is reasonably  
14 calculated to give defendant Paul Wilkie notice and an opportunity to respond. However, Eko  
15 meets the requirements under federal and Nevada law to effect service by publication. Therefore,  
16 the motion will be granted in part and denied in part.

## I. Background

18 Plaintiff Eko Brands ("Eko") accuses defendants Houseware Solutions, LLC, and Paul  
19 Wilkie of infringing on patents held by Eko. ECF No. 1. Eko first attempted to serve Wilkie at  
20 three different suite numbers at a business address located at 10785 West Twain Avenue, Las  
21 Vegas, Nevada 89135 (the "Twain address"). ECF No. 21 at 2. During the third service attempt  
22 in November 2020, a person present at suite 229 informed the process server that Wilkie "did not  
23 work at that address but was instead a client of the business at that address." ECF No. 17-1 at 2;  
24 ECF No. 17-2 at 3. During a January 2021 attempt at suite 102, a person present at the address  
25 represented that Wilkie was unknown and could have been a previous occupant. ECF No. 17-2 at  
26 2. So, Eko hired an investigator to perform a "skip trace" to locate information about Wilkie's  
27 whereabouts. ECF No. 21 at 3.

1           The investigator searched through myriad public databases and records and made three  
 2 key findings. First, the investigator determined that Wilkie "has never had a residential address in  
 3 the Unite[d] States." ECF No. 17-3 at 2. In fact, the only address that Wilkie has ever used here  
 4 in the United States is the Twain address, albeit in three different suite numbers. *Id.* Second,  
 5 Wilkie "appears to be conducting some type of virtual business for [defendant] Houseware  
 6 Solutions, LLC." *Id.* (emphasis omitted). Third, because there was never "any residence ever  
 7 established for [Wilkie ] in this country," the investigator concluded that Wilkie "is likely to be a  
 8 resident of another country." *Id.* at 3. When the investigator called a phone number associated  
 9 with Wilkie, the outgoing voice message had "what appear[ed] to be a British accent," and the  
 10 investigator therefore concluded that Wilkie "is likely to be a citizen of the United Kingdom." *Id.*

11           Eko also identified three email addresses possibly associated with Wilkie. When the  
 12 Court denied Eko's prior service motion, the Court noted that Eko had not attempted to contact  
 13 Wilkie via email. ECF No. 20 at 2. Now, Eko represents that in May 2021 it sent emails to all  
 14 three possible email addresses: the email to mail@housewaresolutions.com bounced back as  
 15 undeliverable; the email to mailer-daemon@yahoo.com was similarly undeliverable; the third  
 16 email to wilkpa60@yahoo.com did not bounce back, but it appears that there was no response.  
 17 ECF No. 21 at 3-4.

18           On these facts, Eko moves for an order permitting service by email or publication.

## 19           **II. Discussion**

20           The Constitution does not require any particular means of service of process. *Rio Props., Inc. v. Rio Intern. Interlink*, 284 F.3d 1007, 1017 (9th Cir. 2002) (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). Instead, it requires only that service "be reasonably calculated to provide notice and an opportunity to respond." *Id.* To that end, service of process is governed by Rule 4 of the Federal Rules of Civil Procedure.

### 25           **A. Service by email**

26           Eko seeks to serve Wilkie via email under Nevada or federal law. Eko believes that  
 27 Wilkie "is located in the United Kingdom." ECF No. 21 at 7. If this is so, then service by email is  
 28 permitted under the Federal Rules of Civil Procedure. Fed. R. Civ. P. 4(f) (permitting service by

1 "internationally agreed means of service that is reasonably calculated to give notice" or "by other  
2 means not prohibited by international agreement, as the court orders."); *Rio Props., Inc. v. Rio*  
3 *Intern. Interlink*, 284 F.3d 1007, 1016 (approving service by email under Rule 4(f)(3)). If Wilkie  
4 is not located outside the United States, then the only means to accomplish service by email under  
5 the Federal Rules of Civil Procedure is by "following state law . . . in the state where the district  
6 court is located or where service is made". To that end, Nevada Rule of Civil Procedure  
7 ("NRCP") 4.4(b) permits service by "any alternative service method," which the Court believes  
8 encompasses service by email. *See Huang v. Carney*, 2020 WL 8881742, at \*3 (D. Nev. Jan. 9,  
9 2020).

10 Here, whether the applicable standard derives from federal or state law, the result is the  
11 same: the Court will not authorize service by email. Due process requires that a defendant be  
12 given "notice reasonably calculated under the totality of the circumstances to inform him of a  
13 pending action and allow him an opportunity to respond and present objections." *Roundtree v.*  
14 *Ultimate Vacation Experience*, 2018 WL 7204220, at \*3 (D. Nev. Oct. 24, 2018) (citing *Mullane*  
15 *v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). Eko has not met its burden of  
16 showing that service by email is reasonably calculated to give notice and an opportunity to  
17 respond. As stated, Eko sent emails to three of Wilkie's possible email addresses in May 2021.  
18 Two of these emails bounced back. The third email to the wilkpa60 email address, however, did  
19 not. Eko argues that the Court should authorize service by email to the wilkpa60 email address  
20 because, "on information and belief," the third email "reached the intended recipient." ECF No. 21  
21 at 6.

22 The Court disagrees. Although the email to the third account did not bounce back, this  
23 does not necessarily mean that service through this email is reasonably calculated to give notice  
24 and an opportunity to respond. The Court has no idea where the wilkpa60 email address came  
25 from. The private investigator represents that "[t]he only email address [he] found for Mr. Paul  
26 Wilkie" was paul\_wilkie2002@yahoo.com. ECF No. 17-3 at 3. But the record does not indicate  
27 the basis for Eko's belief that wilkpa60@yahoo.com belongs to Wilkie.

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1 Eko points to no caselaw where a court has authorized service by email under these or  
2 similar circumstances. In fact, the caselaw authorizing service by email only illustrates why the  
3 Court must deny Eko's request. For example, courts have authorized service by email when a  
4 defendant held out an email address "as its real email address and invited members of the public to  
5 send it messages to that address." *MOM Enters., Inc. v. Roney Innovations, LLC*, 2020 WL  
6 8614207, at \*3 (N.D. Cal. Sept. 17, 2020). But here, Eko has not explained how it located the  
7 wilkpa60 account, and nor has it convinced the Court that the account belongs to Wilkie.

8 In fact, the case before the Court seems more akin to *Hawkins v. Bank of America, N.A.*,  
9 2018 WL 1616941 (S.D. Cal. Apr. 4, 2018). There, the plaintiff similarly sought to effect service  
10 by email under Rule 4(f)(3). *Id.* at 4. However, the plaintiff stated that he was not currently  
11 communicating with the defendant at the relevant email address. *Id.* Further, the plaintiff's only  
12 basis for concluding that the email address belonged to the defendant was that the plaintiff had  
13 been copied on an email "sent by another family member to [plaintiff] and [defendant]." *Id.*  
14 Plaintiff did not provide supporting documentation regarding the email address he identified as  
15 belonging to defendant, "such as a copy of the email that was sent or any response by [defendant]  
16 to that email." *Id.* And plaintiff did not otherwise provide evidence that defendant regularly  
17 communicated from the relevant email address. *Id.* Therefore, the Court found that there was "far  
18 too thin of an evidentiary basis" to conclude that it was appropriate to effect service at the email  
19 address that plaintiff identified. *Id.*

20 Here, Eko, like the plaintiff in *Hawkins*, has likewise failed to show that it currently  
21 communicates with Wilkie using the relevant email address or that Wilkie regularly communicates  
22 from the same. Although Eko does provide a copy of an email that was sent to the wilkpa60  
23 address, Eko did not provide a copy of any response by Wilkie. In short, Eko, too, provides far too  
24 thin an evidentiary basis to conclude that service by email is appropriate. The request for service  
25 by email is therefore denied.

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1                   **B. Service by publication**

2                   Eko also seeks to serve Wilkie by publication under NRCP 4.4(b). Eko would like to  
 3 publish the summons and complaint in Nevada Legal News, which circulates in Southern Nevada,  
 4 and the Law Society Gazette, which circulates in England and Wales. ECF No. 21 at 9.

5                   The Federal Rules of Civil Procedure allow a party to effect service by following the state  
 6 law where the district court is located or where service is made. Fed. R. Civ. P. 4(e)(1). This  
 7 Court sits in Nevada, and Nevada law permits service by publication. NRCP 4.4(c).

8                   A litigant who desires to effect service by publication must meet eight requirements.  
 9 NRCP 4.4(c).<sup>1</sup> The litigant must (1) establish that “the service methods provided in [NRCP] 4.2,  
 10 4.3, and 4.4(a) and (b) are impracticable”;<sup>2</sup> (2) demonstrate that the defendant cannot, after due  
 11 diligence, be found, or that the defendant seeks to avoid service of process through concealment;

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13                   <sup>1</sup> NRCP 4.4 provides:

14                   (c) **Service by Publication.** If a party demonstrates that the service methods provided in Rules 4.2, 4.3, and  
 15 4.4(a) and (b) are impractical, the court may, upon motion and without notice to the person being served, direct that  
 service be made by publication.

16                   (1) **Conditions for Publication.** Service by publication may only be ordered when the defendant:  
 17                   (A) cannot, after due diligence, be found;  
 18                   (B) by concealment seeks to avoid service of the summons and complaint; or  
 19                   (C) is an absent or unknown person in an action involving real or personal property under Rule 4.4(c)(3).

20                   (2) **Motion Seeking Publication.** A motion seeking an order for service by publication must:  
 21                   (A) through pleadings or other evidence establish that:  
 22                   (i) a cause of action exists against the defendant who is to be served; and  
 23                   (ii) the defendant is a necessary or proper party to the action;  
 24                   (B) provide affidavits, declarations, or other evidence setting forth specific facts demonstrating the efforts  
 25 that the plaintiff made to locate and serve the defendant;  
 26                   (C) provide the proposed language of the summons to be used in the publication, briefly summarizing the  
 27 claims asserted and the relief sought and including any special statutory requirements;  
 28                   (D) suggest one or more newspapers or other periodicals in which the summons should be published that  
 are reasonably calculated to give the defendant actual notice of the proceedings; and

2                   (E) if publication is sought based on the fact that the defendant cannot be found, provide affidavits,  
 3 declarations, or other evidence establishing the following information:  
 4                   (i) the defendant’s last-known address;  
 5                   (ii) the dates during which the defendant resided at that location; and  
 6                   (iii) confirmation that the plaintiff is unaware of any other address at which the defendant has resided  
 7 since that time, or at which the defendant can be found.

2                   <sup>2</sup> NRCP 4.2 tracks federal Rule 4(e)(2) and permits service of an individual by either delivering a  
 3 copy of the summons and complaint to the individual personally, leaving the copies at the individual’s dwelling with  
 4 a person of suitable age and discretion, or delivering the copies to an agent authorized by appointment or by law to  
 receive service of process. NRCP 4.2(a); Fed. R. Civ. P. 4(e)(2). NRCP 4.3 governs service of individuals located  
 outside Nevada or outside the United States. NRCP 4.4(a) governs service in a manner prescribed by statute. And  
 NRCP 4.4(b) governs service “through any alternative service method.”

1 (3) establish through pleadings or other evidence that a cause of action exists against the  
2 defendant; (4) demonstrate that the defendant is a necessary or proper party to the action; (5) set  
3 forth specific facts demonstrating the efforts plaintiff made to locate and serve the defendant;  
4 (6) provide the proposed language of the summons to be used in the publication, briefly  
5 summarizing the claims asserted and the relief sought; (7) suggest one or more newspapers in  
6 which the summons should be published that are reasonably calculated to give the defendant  
7 actual notice; and (8) provide the defendant's last-known address, the dates during which  
8 defendant lived at that address, and confirmation that plaintiff is unaware of any other address at  
9 which defendant has resided since that time or at which defendant can be found. NRCP 4.4(c).

10       Here, the Court finds that Eko has met the requirements for service by publication here in  
11 Southern Nevada. First, it is clear to the Court that the service methods in NRCP 4.2, 4.3, and  
12 4.4(a) and (b) are impracticable. NRCP 4.2 permits service upon individuals via personal  
13 service, substitute service,<sup>3</sup> or delivering a copy of the summons and complaint to an agent  
14 authorized by appointment or law to receive service of process. Eko is unaware of Wilkie's  
15 location or home address, which means that personal or substitute service is impracticable.  
16 Further, it does not appear that Wilkie has appointed an agent to receive service of process, so this  
17 method of service is impracticable, too.

18 Service under NRCP 4.3 governs service outside Nevada (either in a different state, or in a  
19 different country altogether), but this method of service is likewise impracticable. Although Eko  
20 asserts that Wilkie was born and may currently be in the U.K., the Court is unwilling to make the  
21 same conclusion. Eko's assertion is based on the skip trace, which plainly states that "the only  
22 basis [the investigator] has for believing [] Wilkie is likely to be a citizen of the United Kingdom,  
23 is that a phone number found for him . . . has an adult male voicemail recording of what appears  
24 to be a British accent." ECF No. 17-3 at 3. Further, although Eko represents that the skip trace  
25 revealed that Wilkie was born in the United Kingdom, the investigator's affidavit does not make

<sup>3</sup> "Substitute service" means leaving a copy of the summons and complaint with a persons of suitable age and discretion who currently resides at the defendant's dwelling or usual place of abode. NRCP 4.2(a).

1 that representation. Accordingly, the fruits of Eko's diligent search do not point toward a location  
2 outside Nevada or the United States, and service under NRCP 4.3 is therefore impracticable.

3 That leaves NRCP 4.4(a) and (b). Under subsection (a), service can be accomplished  
4 through any means authorized by statute. NRCP 4.4(a). It does not appear that there exists a  
5 statute applicable to the circumstances here, so this method is likewise impracticable. Turning to  
6 subsection (b), Nevada permits service through "any alternative service method." NRCP  
7 4.4(b)(1). This language clearly encompasses service by email, which the Court has already said  
8 is inconsistent with Rule 4 of the Federal Rules of Civil Procedure. Apart from email, it does not  
9 appear that there exists an alternative service method that is reasonably calculated to give Wilkie  
10 notice and an opportunity to respond. Thus, service under NRCP 4.4(b) is impracticable, too. In  
11 sum, then, the service methods in NRCP 4.2, 4.3, and 4.4(a) and (b) are impracticable, and the  
12 first of eight requirements is met.

13 Turning to the second and fifth requirements, Eko has shown that Wilkie cannot, after due  
14 diligence, be found. Eko's service methods are set forth above. They include multiple attempts at  
15 several suites at the Twain address over several weeks and at different times of the day. The  
16 persons who were present at the Twain address stated that Wilkie was either unknown or that he  
17 did not work there. After these unsuccessful attempts, the investigator performed a diligent skip  
18 trace using several public databases. The skip trace yielded some helpful information, but  
19 nothing that led to information about Wilkie's present location (or that should have prompted Eko  
20 to investigate further). Therefore, the Court finds that Eko has satisfied the second and fifth  
21 requirements.

22 The third and fourth requirements are also met. The pleadings in this case show that Eko  
23 has a cause of action against Wilkie and defendant Houseware Solutions for patent infringement.  
24 ECF No. 1. Wilkie is believed to be an owner and manager of Houseware Solutions, and Eko  
25 seeks to enjoin both defendants from making, offering, and selling the allegedly patent-infringing  
26 products. ECF No. 21 at 9. This is sufficient for the third and fourth requirements.

27 For the sixth requirement, the Court notes that the Clerk of Court has already issued a  
28 summons for Wilkie at ECF No. 5. The requirements for a summons are set forth in the Federal

1 Rules of Civil Procedure. Fed. R. Civ. P. 4(a). Therefore, the Court will not require Eko to  
 2 modify the summons already issued to Wilkie.

3 For the seventh requirement, Eko proposed that service be accomplished through Nevada  
 4 Legal News. Nevada Legal News is a newspaper of general circulation printed in Las Vegas,  
 5 Clark County, Nevada. *See JMA Architects v. Citation Prop. Grp.*, Case No. A555070, 2008 WL  
 6 8644360 (Nev. Dist. Ct. Nov. 10, 2008); *see also Bank of New York Mellon v. Wash. & Sandhill*  
 7 *Homeowners Assoc.*, 2020 WL 1434225, at \*2 (D. Nev. Mar. 23, 2020) ("There may be some  
 8 doubt as to whether Plaintiff's service was improper, given that Plaintiff submitted proper proof  
 9 of service by publication in Nevada Legal News."). The Court finds, for three reasons, that  
 10 service by publication in Southern Nevada is reasonably calculated to reach Wilkie: (1) the  
 11 Nevada Secretary of State's website reflects that Wilkie is a manager of two Nevada businesses;  
 12 (2) for these Nevada businesses, Wilkie lists the Twain address as his own; (3) the investigator  
 13 identified a prepaid cellular telephone number for Wilkie with a (702) area code, and the Court  
 14 takes judicial notice that this area code covers Las Vegas, Nevada.<sup>4</sup> These three facts, taken  
 15 together, do not necessarily or conclusively show that Wilkie resides in Las Vegas, but they do  
 16 show that he likely conduct business here. For the Court to authorize service by publication in  
 17 Southern Nevada, the U.S. Constitution requires only that service be "reasonably calculated" to  
 18 reach Wilkie, it does not mandate that the Court find with certainty that Wilkie will in fact receive  
 19 notice. *See United States v. Benson*, 2019 WL 6612246, at \* (N.D. Cal. Dec. 5, 2019) ("it is  
 20 generally recognized that service by publication rarely results in actual notice."). Here, the Court  
 21 in its discretion finds that service by publication in Nevada Legal News is reasonably calculated  
 22 to give Wilkie notice and an opportunity to respond, which means that Eko meets the seventh  
 23 requirement.

24 Eko meets the final requirement, too. Wilkie's last-known contact information is set forth  
 25 in the underlying motion and its exhibits, and in the investigator's skip trace report at ECF No.  
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27                 <sup>4</sup> The Court may take judicial notice of a fact that is not subject to reasonable dispute because it  
 28 "is generally known within the trial court's territorial jurisdiction." Fed. R. Evid. P. 201(b)(1)

1 17-3. Further, the Court is satisfied that Eko is unaware of any other address where Wilkie has  
2 resided since he was present at the Twain address.

3 In sum, the Court finds that Eko meets the eight requirements for service by publication  
4 under Nevada law, and the motion will be granted. The Court notes that while the Court was  
5 considering Eko's motion, the deadline for service expired. ECF No. 19. The Court may sua  
6 sponte extend the time for service on the basis of good cause. *Sikking v. Griswold*, 2020 WL  
7 8666385, at \*1 (S.D. Cal. Oct. 2, 2020) ("The Court sua sponte extended the time for service");  
8 *Tabi v. McCullough*, 2019 WL 3997062, at \*2 (C.D. cal. Aug. 22, 2019) ("The September Order  
9 sua sponte extended the original Rule 4(m) service time limit"); *Pardo v. Briley*, 2004 WL  
10 2792919, at \*1 (N.D. Ill. Sept. 22, 2004) ("this Court sua sponte extends the time allowed by Rule  
11 4(m)"). Here, the Court will sua sponte extend the time for service because the Court in its  
12 discretion finds that there exists good cause.

13 **III. Conclusion**

14 IT IS THEREFORE ORDERED that Plaintiff's motion (ECF No. 21) is GRANTED in  
15 part and DENIED in part as stated in this order.

16 IT IS FURTHER ORDERED that plaintiff must publish the summons and complaint in  
17 Nevada Legal News (and not the Law Society Gazette) at least once a week for a period of four  
18 weeks. Service will be deemed complete four weeks from the date of the first publication.

19 IT IS FURTHER ORDERED that plaintiff must send a copy of the summons and  
20 complaint to the email addresses it identified as possibly belonging to Wilkie and by certified  
21 mail to the addresses where it attempted service.

22 IT IS FURTHER ORDERED that the deadline for service upon defendant Wilkie is  
23 extended up to and including 45 days following the issuance of this order.

24 DATED: August 20, 2021

25   
Brenda Weksler  
26 United States Magistrate Judge  
27  
28